

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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_____ CIVIL ACTION NUMBER:
NEWARK EDUCATION WORKERS 2:18-cv-11025-ES-CLW
CAUCUS and NATURAL RESOURCES
DEFENSE COUNCIL, INC., DECISION

Plaintiffs,

v.

Pages 1 - 17

CITY OF NEWARK, NEWARK
DEPARTMENT OF WATER AND
SEWER UTILITIES, RAS BARAKA,
ANDREA ADEBOWALE and
CATHERINE R. McCABE,

Defendants.

_____ **Martin Luther King Building & U.S. Courthouse**
50 Walnut Street
Newark, New Jersey 07101
Friday,

B E F O R E: THE HONORABLE ESTHER SALAS,
UNITED STATES DISTRICT JUDGE

Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

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1 (PROCEEDINGS held in before The Honorable ESTHER
2 SALAS, United States District Judge.)

3 THE COURT: We are on the record in the matter of
4 Newark Education Workers Caucus, et al. v. City of Newark, et
5 al., Civil Action Number 18-11025.

6 Before the Court is Plaintiffs' motion for a
7 preliminary injunction. On August 9, 2019, the United States
8 Environmental Protection Agency provided Defendants with the
9 test results of water samples taken from two households in the
10 Pequannock service area who had received filtration devices.
11 (Docket Entry Number 241). The EPA conducted this test to
12 evaluate whether the filtration devices distributed by the
13 City of Newark are effectively reducing lead concentrations in
14 the water. (See Docket Entry Number 241-4). The test results
15 indicate that the filtered drinking water samples taken from
16 these two households continue to have lead levels exceeding
17 the federal action level of 15 parts per billion. (Id. at 1).
18 As a result, the EPA recommended that, among other things, the
19 City of Newark provide bottled water to affected Newark
20 residents until it can be assured that the filtration devices
21 are reliable. (Id.). On August 10, the City of Newark issued
22 a notice informing the public that bottled water will be
23 distributed to residents in the Pequannock service area who
24 have lead service lines. (Docket Entry Number 243-1).
25 Residents in Newark's Wanaque service area are not covered by

1 the bottled water distribution program.

2 Plaintiffs now request that the Court order
3 Defendants to extend the new bottled water distribution
4 program to households with pregnant women, nursing women, or
5 children under the age of six within the Wanaque service area.
6 (See Docket Entry Number 143; Transcript of August 15, 2019
7 Hearing at page 17, lines 3 to 7). Having considered the
8 parties' written submissions, as well as the witness testimony
9 and oral arguments presented during a two-day hearing held on
10 August 15 and 16, 2019, the Court is now prepared to rule.

11 Injunctive relief is an extraordinary remedy, which
12 should be granted only in limited circumstances. *Reedy v.*
13 *Borough of Collingswood*, 204 Federal Appendix 110, 113 (Third
14 Circuit 2006); see also *AT&T v. Winback and Conserve Program,*
15 *Inc.*, 42 F.3d 1421, 1426 to 1427 (Third Circuit 1994). To
16 obtain a preliminary injunction, a movant must show: (1) that
17 it will likely succeed on the merits; (2) that it will suffer
18 irreparable harm if the injunction is denied; (3) that
19 granting preliminary relief will not result in even greater
20 harm to the nonmoving party; and (4) that the public interest
21 favors such relief. *Reilly v. City of Harrisburg*, 858 F.3d
22 173, 176 (Third Circuit 2017).

23 “Likelihood of success” and “irreparable harm” are
24 the two “gateway factors.” *Id.* at 176 to 179. Only if a
25 movant meets its burden of demonstrating both gateway factors,

1 does a court consider the remaining two factors and balance
2 all four. *Id.* at 179. Additionally, mandatory injunctions,
3 such as the one sought here, impose a heavier burden on the
4 movant and are generally disfavored. See *Punnett v. Carter*,
5 621 F.2d 578 (Third Circuit 1980); see also *Coast to Coast*
6 *Entertainment, LLC v. Coastal Amusements, Inc.*, No. CIV.A.
7 05-3977 MLC, 2005 WL 7979273, at *9 (District of New Jersey,
8 November 7, 2005) (citing *United States v. Spectro Foods*
9 *Corporation*, 544 F.2d 1175, 1181 (Third Circuit 1976)).

10 As the Court will explain, Plaintiffs fail to produce
11 sufficient evidence to demonstrate that the Wanaque residents
12 are likely to suffer irreparable harm in the absence of
13 preliminary relief. As such, the Court denies Plaintiffs'
14 motion.

15 By way of background, Plaintiffs do not contend that
16 water leaving the Wanaque treatment plant has inadequate
17 orthophosphate concentrations. (Transcript of August 15, 2019
18 Hearing at page 72, lines 2 to 7; page 76, lines 1 to 5). It
19 is also undisputed that the gates and valves that led to the
20 blending of Pequannock water into the Wanaque service area
21 have been closed since January 2019, and the water is no
22 longer blending. (Transcript of August 16, 2019 Hearing at
23 page 34 (Plaintiffs' counsel stating that "we don't dispute
24 that the gates were closed and we don't dispute at this time
25 that the levels of orthophosphate are now similar on both

1 sides.”)). The parties' experts further agreed that even if
2 blending were to occur today, corrosion control in the Wanaque
3 service area would not be materially affected because the
4 current water compositions in the two service areas are
5 essentially the same. (Id.; see also id. at page 10
6 (Plaintiffs' counsel stating “Your Honor... your first
7 question about the water being the same on either side, we do
8 not dispute that at this point”); Transcript of August 15,
9 2019 Hearing at page 216, line 17 to page 217, line 17).

10 Instead, Plaintiffs contend that the water pipes in
11 the Wanaque service area “may have been” insufficiently
12 passivated because of the blending of
13 low-orthophosphate-containing water from the Pequannock
14 service area. (See, e.g., Transcript of August 15, 2019
15 Hearing at page 95, lines 5 to 15). And according to
16 Dr. Daniel Giammar, Plaintiffs' expert, the pipes need six to
17 twelve months to recover under the adequate concentration of
18 orthophosphate, which was restored in January 2019. (Id.; see
19 also id. at page 58, lines 18 to 23). As a result, Plaintiffs
20 contend that the corrosion control is likely ineffective in
21 the Wanaque service area, and high levels of lead are still
22 leaking into the water. (See, e.g., id. at page 66, line 23
23 to page 67, line 10).

24 To support their contentions, Plaintiffs largely rely
25 on the sequential sampling analyses and the scale analyses

1 from the June 28, 2019 CDM Smith Report, as well as test
2 results of first-draw samples collected from January to June
3 2019. (Id. at page 61, line 2 to page 67, line 10; Exhibits 9
4 and 83). Moreover, for purposes of this motion, the parties
5 have stipulated that the 90th percentile lead level of all
6 drinking water samples collected in the Wanaque service area
7 for the first half of 2019 is between 14.65 parts per billion
8 and 15.65 parts per billion. (Docket Entry Number 242).
9 Plaintiffs contend that the stipulated 90th percentile lead
10 level range is further evidence that the corrosion control
11 treatment in the Wanaque service area still does not
12 adequately reduce lead levels in drinking water to below the
13 federal action level. (See, e.g., Transcript of August 15,
14 2019 Hearing at page 59, line 20 to page 60, line 13).

15 Plaintiffs are missing an important point: In order
16 to support a preliminary injunction, the moving party must
17 make a "clear showing of immediate irreparable harm."
18 *Campbell Soup Company v. ConAgra, Inc.*, 977 F.2d 86, 91 (Third
19 Circuit 1992). By definition, a preliminary injunction cannot
20 redress past harm. See *id.* Here, the evidence Plaintiffs
21 present is insufficient to show that the residents in the
22 Wanaque service area face current and prospective harm caused
23 by the allegedly elevated lead levels in their drinking water.
24 First, Plaintiffs fail to provide sufficient evidence
25 to support their argument that the scales on the water pipes

1 in the Wanaque service area were indeed compromised by water
2 from the Pequannock service area. As proof that the blending
3 areas in the Wanaque service area "may" have insufficiently
4 passivated water pipes "as bad as it was in the Pequannock,"
5 Plaintiffs point to three locations analyzed in the CDM Smith
6 Report where elevated lead levels were detected in sequential
7 sampling analyses. (See Transcript of August 15, 2019 Hearing
8 at page 95, lines 5 to 11; page 63, line 15 to page 66, line
9 6). Plaintiffs highlight that the scale analysis for one of
10 these locations, 95 Pennsylvania, shows that the pipes at this
11 location did not have the desired passivating layer of lead
12 phosphate. (Id. at page 66, lines 7 to 22; Transcript of
13 August 16, 2019 Hearing at page 11).

14 However, the very report Plaintiffs rely on concludes
15 that the scales on Wanaque's water pipes were not compromised.
16 Specifically, the CDM Smith Report states that for the Wanaque
17 system, "while the scale morphology varies throughout the
18 system, the scales appear to be functioning to control lead
19 solubility," and that "the scales are providing protection
20 against lead correction." (Exhibit 9 at pages 5-8 and 6-1).
21 And as Defendants' expert, Dr. Steven H. Reiber, testified,
22 "the conclusion made by the folks at the EPA Cincinnati, who
23 do this best, was that there was an abundance of both the lead
24 phosphates and the plattnerites compound, so they recognize
25 those both as being essential to the acidation of pipe

1 surfaces." (Transcript of August 15, 2019 Hearing at page
2 211, lines 21 to 25).

3 The CDM Smith Report also shows that, of the three
4 locations identified by Plaintiffs, only 14 Hinsdale was
5 potentially in the blending area. (Exhibit 9 at pages 4-5,
6 4-11, and 4-14; Transcript of August 15, 2019 Hearing at page
7 204, lines 20 to 25). Dr. Reiber credibly testified, and
8 Plaintiffs do not dispute, that the water pipes at 14 Hinsdale
9 were in fact "well-passivated" with "well-formed scale with an
10 abundance of the lead phosphates and the plattnerites."
11 (Transcript of August 15, 2019 Hearing at page 205, lines 2 to
12 6; see also *id.* at page 205, lines 17 to 20 ("And my point is
13 that even in the Hinsdale example, as well as all the others,
14 there was a distribution of both the lead phosphates and
15 plattnerites. And that's indicative of a well-passivated lead
16 surface. There's no getting around that.")).

17 More specifically to Plaintiffs' argument regarding
18 95 Pennsylvania, the CDM Smith Report states that "more
19 dominant plattnerite scales were found on the pipes harvested
20 in 95 Pennsylvania Avenue," but "unlike Pequannock, the
21 plattnerite scales in the Wanaque Gradient appear to be stable
22 and effectively controlling lead release." (Exhibit 9 at page
23 5-8). Dr. Reiber further explained that, while "the
24 plattnerite was more abundant than the lead phosphate" at 95
25 Pennsylvania, both compounds were present "in all of the pipes

1 and contributing to a well-passivated surface.” (See
2 Transcript of August 15, 2019 Hearing at page 212, lines 1 to
3 3; see also Exhibit 9 at Table 5-3 (showing that various scale
4 compounds were found at each of the five Wanaque locations)).

5 Second, even assuming the corrosion control treatment
6 in Wanaque was at one point compromised, Plaintiffs still fail
7 to present sufficient evidence to show that there is a present
8 or prospective risk of elevated lead levels in the Wanaque
9 service area that warrants bottled water delivery.

10 Plaintiffs' expert agreed that the risk of harm faced by
11 Wanaque residents “is definitely lower now” since the blending
12 has been stopped. (Transcript of August 15, 2019 Hearing at
13 page 93, line 24 to page 94, line 7). The important question
14 is thus what the lead levels are as of now -- eight months
15 after the water gates were closed and adequate orthophosphate
16 concentration was restored.

17 Plaintiffs contend that “there is reason to doubt”
18 that Wanaque's corrosion control treatment is currently
19 effective. (See, e.g., *id.* at page 62, lines 20 to 25). In
20 support, Plaintiffs rely on two additional pieces of evidence:
21 I) the parties' stipulation that the 90th percentile lead
22 level of all drinking water samples collected in the Wanaque
23 service area for the first half of 2019 is between 14.65 and
24 15.65 parts per billion (*Id.* at page 59, line 20 to page 60,
25 line 13; Docket Entry Number 242); and ii) test results of

1 water samples taken from the Wanaque service area from January
2 to June 2019, allegedly showing that the lead levels in the
3 Wanaque Service area "are still, in many places, exceeding 15
4 parts per billion" (Transcript of August 15, 2019 Hearing at
5 page 66, line 23 to page 67, line 10; Exhibit 83). But
6 because these two pieces of evidence consolidate all the data
7 from the entire first six to seven months of 2019, they fail
8 to show whether the lead levels have increased or decreased
9 over time. Consequently, the Court cannot draw any meaningful
10 conclusions as to the current lead levels in Wanaque.

11 Conversely, Defendants presented reliable evidence
12 showing a downward trend in the water's lead levels during the
13 first half of 2019. Dr. Reiber testified that the raw data of
14 the water samples taken between January and July 2019 was
15 divided into two-month intervals in order to understand how
16 lead levels in the water samples have changed over time.
17 (Transcript of August 15, 2019 Hearing at page 188, line 19 to
18 page 190, line 6). Particularly, Exhibit 155 indicates that
19 the 90th percentile lead level of water samples collected from
20 January and February, around the time the water gates to
21 Pequannock were closed, was 22.6 parts per billion.
22 Thereafter, the 90th percentile lead level of water samples
23 collected from March and April dropped to 11.5 parts per
24 billion. Most recently, the 90th percentile lead level of
25 water samples collected from May to July dropped further to

1 8.8 parts per billion, which is well below the federal action
2 level of 15 parts per billion. The chronological downward
3 trend, combined with the most recent 90th percentile lead
4 level of 8.8 parts per billion, is strong evidence suggesting
5 that residents in the Wanaque service area are not currently
6 at risk of suffering "irreparable harm."

7 Plaintiffs also presented their own demonstrative
8 chart analyzing the same data underlying Exhibit 155.
9 (Plaintiffs' Exhibit 1). Plaintiffs argue that, when the
10 underlying data samples are grouped differently, the resulting
11 chart shows "an uptick rather than a downturn" of the lead
12 levels. (See Transcript of August 15, 2019 Hearing at page
13 236, lines 2 to 5). But as Dr. Reiber explained, Plaintiffs'
14 Exhibit 1 is unhelpful to show a chronological trend over time
15 because each of the six bars presented in Plaintiffs' Exhibit
16 1 represents an unequal period of time, ranging anywhere from
17 as short as 13 days to as long as 40 days. (Id. at page 240,
18 line 12 to page 242, line 4). Additionally, each bar within
19 Plaintiffs' Exhibit 1 represents a smaller sample size than
20 that provided by Exhibit 155, making Plaintiffs' 90th
21 percentile reading less reliable. (Id. at page 242, line 5 to
22 page 243, line 6). As such, the Court finds Plaintiffs'
23 Exhibit 1 to be a much less useful piece of evidence regarding
24 the current effectiveness of corrosion control treatment in
25 Wanaque.

1 At the very least, Plaintiffs fail to demonstrate
2 that the eight months since the water gates were closed were
3 insufficient for the orthophosphate treatment to be effective.
4 Dr. Giammar estimated that it could take anywhere from six to
5 twelve months for the water pipes in Wanaque to recover,
6 assuming that the water pipes were in fact compromised. (See,
7 e.g., *id.* at page 95, lines 5 to 15). He also testified that
8 Flint, Michigan and Providence, Rhode Island took twelve
9 months after adding orthophosphate to reach lead levels below
10 15 parts per billion, while Washington, D.C. took six to eight
11 months to achieve that goal. (*Id.* at page 51, line 20 to page
12 52, line 20). Yet, while asking the Court to order bottled
13 water for three months, Plaintiffs provide no evidence to
14 support the implication that Wanaque is more like Flint and
15 Providence than Washington, D.C. In other words, Plaintiffs
16 provide no evidence or expert testimony to support the
17 assertion that Wanaque would in fact require twelve months for
18 the current corrosion control to become effective. Instead,
19 Dr. Giammar repeatedly testified that more data was needed to
20 assess the effectiveness, or ineffectiveness, of Wanaque's
21 corrosion control treatment, which is only more reason for the
22 Court to deny the current motion for a preliminary injunction
23 for lack of sufficient evidence as to "irreparable harm":

24 "THE COURT: And again, we're in August, so we're
25 somewhere midway to that -- the sweet spot, for lack of a

1 better way of saying it?

2 "THE WITNESS: Yeah, we're partway there. We need a
3 lot more data, and we need to -- I would say we need a
4 lot of data between now and the end of the year to really
5 track what the trends are to see how long it does take to
6 get down to acceptable levels." (Id. at page 106, lines
7 5 to 12).

8 On the other hand, Defendants present convincing
9 evidence showing that the corrosion control treatment in
10 Wanaque was historically effective and is currently optimized.
11 For example, Dr. Reiber testified that the CDM Smith Report
12 shows that the 90th percentile levels of water samples from
13 Wanaque in the past 10 years were consistently below the
14 federal action level; and the 50th and 70th percentiles from
15 the same time period were consistently non-detectable. (Id.
16 at page 175, line 19 to page 177, line 18; Exhibit 9 at page
17 2-5). Dr. Reiber also testified that the water chemistry in
18 the Wanaque service area has been stable since the water gates
19 were closed (see Transcript of August 15, 2019 Hearing at page
20 199, line 1 to page 201, line 20), and that Wanaque is
21 currently achieving the four principle corrosion control
22 parameters: pH, chloride, orthophosphate, and alkalinity
23 levels (id. at page 169, line 16 to page 169, line 24; see
24 also id. at page 167, lines 12 to 21 (testifying that there is
25 "good evidence" that "corrosion control is being well

1 maintained and that an optimal corrosion control condition has
2 been achieved" in the Wanaque water service area)).

3 Finally, Dr. Reiber also credibly testified that,
4 assuming Wanaque's water system was in fact compromised,
5 optimized corrosion control could be achieved much earlier
6 than six to twelve months. (Id. at page 213, line 8 to page
7 214, line 16). Importantly, Defendants' argument is supported
8 by data closely related to the facts of this case.
9 Specifically, Dr. Reiber explained that recent data from the
10 adjacent Pequannock service area shows that there has been a
11 "dramatic improvement" in the two and a half months since the
12 implementation of orthophosphate treatment in Pequannock, and
13 that "substantial progress" has been made towards optimal
14 corrosion control in that area. (Id. at page 214, line 13 to
15 page 216, line 12; Exhibit 156). Thus, Dr. Reiber opined that
16 this data demonstrates that the Wanaque area could achieve
17 optimization much faster than six to twelve months.
18 (Transcript of August 15, 2019 Hearing at page 213, lines 13
19 to 14).

20 To be abundantly clear, the Court is cognizant that
21 some of the 2019 water samples from the Wanaque area do
22 occasionally show lead-levels exceeding the federal action
23 level. (See, e.g., Exhibit 155). But Dr. Reiber testified,
24 and Plaintiffs do not dispute, that these exceedances are
25 attributable to particulate lead releases -- an inevitable

1 reality in older cities, such as Newark, where lead service
2 lines and lead in-house plumbing still contribute
3 significantly to the water system. (See Transcript of August
4 15, 2019 Hearing at page 177, line 22 to page 179, line 15 and
5 page 196, line 3 to page 197, line 18). As a whole, however,
6 Dr. Reiber explained that the data shows that the Wanaque
7 water service area "was optimized and continues to be
8 optimized," especially considering that slightly less than 70
9 percent of the samples taken between January and July of 2019
10 are non-detects. (Id. at page 184, line 4, page 185, lines 1
11 to 17).

12 Moreover, the record clearly shows that flushing
13 would effectively address the particulate lead release issue.
14 For instance, the CDM Smith Report concludes that: "In all 12
15 sequential sampling events performed within the Wanaque
16 Gradient, the flushed samples were typically below 2ppb
17 indicating that the scale is stable and that flushing is an
18 effective means of reducing lead concentrations." (Exhibit 9
19 at pages 6-1 to 6-2). Additionally, while the parties'
20 experts disagreed as to how long Wanaque residents should
21 flush their pipes before drinking the water, the record is
22 clear that both experts agree that, if done correctly,
23 flushing would effectively reduce the lead level in the water
24 to acceptable levels. (See Transcript of August 15, 2019
25 Hearing at page 77, line 23 to page 78, line 3 (Dr. Giammar

1 stating that "on the basis of the 10 sequential sampling
2 results that we have for the Wanaque, it would appear that
3 flushing would be [effective] for those 10"); *id.* at page 196,
4 lines 6 to 12 (Dr. Reiber agreeing with Dr. Giammar that
5 "flushing in the Wanaque system could be very effective"
6 particularly because "the lead service lines themselves are
7 releasing very little lead, oftentimes nondetectable levels of
8 lead"). Furthermore, Plaintiffs' expert also admitted that
9 flushing, as opposed to bottled water, is part of the EPA's
10 standard recommendation in lead action level exceedance
11 situations. (See *id.* at page 77, lines 13 to 16).

12 Considering the stipulated 90th percentile lead level
13 range, the low lead levels detected in sequential sampling
14 analyses, and the experts' testimony, the Court is
15 sufficiently convinced that flushing, if implemented
16 correctly, could effectively reduce any risk of elevated lead
17 levels in the Wanaque drinking water.

18 Finally, the Court is certainly aware of the
19 potential health effects of lead, as explained in detail by
20 the declarations of Plaintiffs' health experts. (See, e.g.,
21 Docket Entry Number 151-2). Yet, while asking the Court to
22 impose a mandatory injunction, which are generally disfavored,
23 Plaintiffs do not dispute that no court in this country has
24 ever ordered bottled water at lead levels stipulated by the
25 parties. (Transcript of August 15, 2019 Hearing at page 121,

1 lines 2 to 10; see also Transcript of August 16, 2019 Hearing
 2 at pages 15 to 16). And as the Court has explained,
 3 Plaintiffs fail to make a sufficient showing of imminent
 4 irreparable harm because they have not shown that there is
 5 currently a systematic failure in the Wanaque water service
 6 area. To the contrary, the evidence presented during the
 7 hearing supports the finding that the corrosion control in the
 8 Wanaque service area is in fact functioning and effective.
 9 Because the Court finds that Plaintiffs fall short of meeting
 10 their burden of demonstrating irreparable harm, there is no
 11 need for the Court to address the other factors under the
 12 preliminary injunction analysis.

13 For the foregoing reasons, the Court denies
 14 Plaintiffs' motion for a preliminary injunction seeking to
 15 provide bottled water to households with pregnant women,
 16 nursing women, or children under the age of six within the
 17 Wanaque service area.

18 (Proceedings concluded.)

19 - - - - -

20 I certify that the foregoing is a correct transcript
 21 from the record of proceedings in the above-entitled matter.

22
 23 /s/ Mary Jo Monteleone, CCR, CRCR, RPR
 24 Court Reporter

25 08/30/2019
 Date